

SERVICE DATE – DECEMBER 23, 2004

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

STB Docket No. AB-876X

R.J. CORMAN EQUIPMENT COMPANY, LLC–ABANDONMENT EXEMPTION–IN
JOHNSON, MAGOFFIN AND BREATHITT COUNTIES, KY

STB Docket No. AB-875X

R.J. CORMAN RAILROAD COMPANY/BARDSTOWN LINE–DISCONTINUANCE OF
SERVICE EXEMPTION–IN JOHNSON, MAGOFFIN AND BREATHITT COUNTIES, KY

Decided: December 21, 2004

By petition filed on September 7, 2004, R.J. Corman Equipment Company, LLC (RJCE) and R.J. Corman Railroad Company/Bardstown Line (RJCR) (collectively, Corman or petitioner) jointly seek an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903.¹ RJCE seeks to abandon, and RJCR seeks to discontinue service over, a line of railroad known as the Dawkins Line, extending from milepost 0.05 at Dawkins, KY, to the end of the track at milepost 36.13 near Evanston, KY, a distance of approximately 36.08 miles in Johnson, Magoffin and Breathitt Counties, KY. Notice of the filing was served and published in the Federal Register on September 27, 2004 (69 FR 57747). A request for imposition of a public use condition and issuance of a notice of interim trail use (NITU) was filed by Judge Executive Roger “Tucker” Daniel and the Johnson County Fiscal Court, Judge Executive Bill May and the Magoffin County Fiscal Court, and Judge Executive Lewis Warrix and the Breathitt County Fiscal Court (collectively, the Counties). We will grant the petition for exemption, subject to trail use, public use, environmental, and standard employee protective conditions.

BACKGROUND

The Dawkins Line is a single-track, stub-ended line that begins at a connection with a main line of CSX Transportation, Inc. (CSXT) at milepost 0.05 in Dawkins (Paintsville), and extends in a

¹ RJCE and RJCR are Class III common carriers commonly controlled by Richard J. Corman. They are part of the R.J. Corman family of railroads, which includes seven other Class III carriers in the eastern United States.

generally southwesterly and southeasterly direction. RJCE acquired the Dawkins Line from CSXT in 2002, and RJCR simultaneously leased the line from RJCE.

Corman states that the Dawkins Line was used primarily to service a coal mine at Skyline, KY, near the end of the line at Evanston, operated by the only significant shipper, Appalachian Fuels LLC (Appalachian Fuels). Corman further states that after Appalachian Fuels encountered financial difficulties, rail shipments of coal from the mine ceased in early 2003 and have not resumed. Corman states that it does not believe that mining operations are currently being conducted at the Skyline mine, and that it has not been informed that mine operations are likely to resume at any time in the near future.

According to Corman, besides unit coal trains from the Skyline mine, the only other rail traffic handled on the Dawkins Line in recent years was a minimal volume (approximately 20 cars annually) of scrap steel from Ivyton, KY. Corman avers that that traffic is now handled by truck. Corman further states that, since March 2003, there have been no rail operations of any kind on the Dawkins Line, which is physically isolated from other affiliated rail lines. Corman adds that, because there are now no resident employees assigned to this inactive line, RCJE must dispatch employees from other locations several hours away to perform any necessary work on the line. Corman adds that it is aware of no prospects for other new sources of traffic on the Dawkins Line.

Corman claims that, after serious area flooding in the spring of 2004, returning the line to service would require approximately \$70,000 in emergency washout repairs and \$128,000 in longer term bridge repairs. Corman estimates that the net liquidation value (NLV) of the Dawkins Line was at least \$3,000,000 in 2002, and is significantly higher now. Petitioner claims to be incurring substantial opportunity costs in retaining this inactive line.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned and service may not be discontinued, without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving RJCE of the expense of maintaining a line that is no longer used and allowing it to use its assets more productively elsewhere on its system. [49

U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be affected adversely.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. The only previous significant shipper on the line has ceased all rail transportation of coal, and the only other recent shipper now uses motor carrier service for its transportation needs. Moreover, neither shipper opposes this abandonment and discontinuance. Nevertheless, to ensure that those shippers are informed of our action, we will require Corman to serve a copy of this decision and notice on each of them within 5 days of the service date and to certify to us that it has done so. Given our market power finding, we need not determine whether the proposed transaction is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

RJCE has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, analyzed the probable effects of the proposed action on the quality of the human environment, and served an environmental assessment (EA) on November 5, 2004.

In the EA, SEA states that the National Geodetic Survey (NGS) has advised it that 14 geodetic station markers have been identified along the rail line that may be affected by the proposed abandonment. Therefore, SEA recommends a condition requiring RJCE to notify NGS 90 days prior to salvage activities to plan for their relocation.

SEA also states that the abandonment falls under the jurisdiction of both the Louisville District and the Huntington District of the United States Army Corps of Engineers (USACE). The Louisville District responded to the Environmental and Historic Reports and voiced no environmental concerns. However, the Huntington District had not responded to the reports at the time that the EA was prepared. Accordingly, SEA recommended that RJCE contact the USACE, Huntington District, prior to commencement of any salvage activities to determine whether a USACE permit would be required for the portion of the line located in zip codes 41240, 41260, and 41222.

Further, SEA states in the EA that, because the line either crosses or is adjacent to several perennial and intermittent streams, the Kentucky Department of Natural Resources, Environmental and Public Protection Cabinet (KDNR), determined that the water quality and aquatic habitat of these

streams could be adversely affected by the proposed project. KDNR expressed concern regarding erosion and sedimentation control and recommended that RJCE follow best management practices to prevent nonpoint water pollution.² Based on KDNR's recommendations, SEA recommends that best management practices be followed during salvage activities.

RJCE has submitted a historic report, and has served the report on the Kentucky Heritage Council (the State Historic Preservation Office or SHPO). See 49 CFR 1105.8. SEA states in the EA that the SHPO has not yet completed its evaluation of the potential impact of the proposed abandonment. Therefore, SEA recommended in the EA that, pending completion of the SHPO's review, a condition be imposed requiring RJCE to retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years old or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

Comments on the EA were due by December 6, 2004. Based on comments received, SEA has recommended several modifications regarding conditions that had been recommended in the EA. Based on concerns by Johnson County that the water flow in several streams and creeks has been hampered by trash and debris build-up under some of the line's railroad bridges, SEA has recommended a new consultation condition requiring that RJCE, prior to commencement of any salvage activities, contact Johnson County to discuss those concerns. Based on comments from Corman, SEA has recommended modifying the language of the environmental condition relating to NGS. Based on comments received from USACE, Huntington District, which concluded that the proposed abandonment and discontinuance of service, as outlined, would not involve the discharge of fill material in waters of the United States and thus that a USACE permit under section 404 of the Clean Water Act would not be required, SEA has recommended that the USACE condition it had previously recommended in the EA not be imposed. The environmental conditions recommended by SEA in the EA, and as supplemented and modified based on comments received, will be imposed. Based on SEA's recommendation, we conclude that the proposed abandonment, if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

As previously noted, the Counties filed a request for the issuance of a NITU under the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), and for imposition of a public use condition under 49 U.S.C. 10905. They have submitted a statement of willingness to assume financial responsibility for the right-of-way, and have acknowledged that use of the right-of-way is subject to possible future

² According to SEA, the manual "Best Management Practices for Construction Activities" contains information on the best management practices that are most appropriate and is available through the Breathitt, Johnson, or Magoffin County Conservation Districts and the Division of Conservation.

reconstruction and reactivation of the right-of-way for rail service as required under 49 CFR 1152.29. By letter filed on December 2, 2004, RJCE states that it is willing to negotiate with the Counties for interim trail use. Because the Counties' request complies with the requirements of 49 CFR 1152.29, and RJCE is willing to enter into trail use negotiations, we will issue a NITU for the subject line. The parties may negotiate an agreement during the 180-day period prescribed below. If an agreement is executed, no further Board action is necessary. If no agreement is reached within 180 days, RJCE may fully abandon the line, subject to the conditions imposed below. See 49 CFR 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to restoration for railroad purposes.

SEA has indicated in its EA that, following abandonment and salvage of the line, the right-of-way may be suitable for other public use. The Counties request imposition of a 180-day public use condition prohibiting RJCE from: (1) disposing of the corridor, other than the tracks, ties and signal equipment, except for public use on reasonable terms; and (2) removing or destroying potential trail-related structures such as bridges, trestles, culverts, and tunnels. The Counties state that there is a significant possibility that this rail corridor could be connected to a successful trail system while preserving the right-of-way for future opportunities, and that the rail structures it seeks to preserve have considerable value for recreational trail purposes. The Counties state that the 180-day period is needed to assemble and review title information, complete a trail plan, and commence negotiations with the carrier.

We have determined that persons who file under the Trails Act may also file for public use under 49 U.S.C. 10905. See Rail Abandonments—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986) (Trails). When the need for both conditions is established, it is our policy to impose them concurrently, subject to the execution of a trail use agreement. The Counties have met the public use criteria prescribed at 49 CFR 1152.28(a)(2) by specifying: (1) the condition sought; (2) the public importance of the condition; (3) the period of time for which the condition would be effective; and (4) justification for the period of time requested. Accordingly, a 180-day public use condition will be imposed on the rail line to be abandoned, commencing from the effective date of this decision and notice, to enable any state or local government agency or other interested person to negotiate the acquisition of the line for public use. If a trail use agreement is reached on a portion of the right-of-way, RJCE must keep the remaining right-of-way intact for the remainder of the 180-day period to permit public use negotiations. Also, we note that a public use condition is not imposed for the benefit of any one potential purchaser. Rather, it provides an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, RJCE is not required to deal exclusively with the Counties, but may engage in negotiations with other interested persons.

The parties should note that operation of the trail use and public use procedures could be delayed, or even foreclosed, by the financial assistance process under 49 U.S.C. 10904. As stated in

Trails, 2 I.C.C.2d at 608, offers of financial assistance (OFA) to acquire rail lines for continued rail service or to subsidize rail operations take priority over interim trail use/rail banking and public use. Accordingly, if an OFA is timely filed under 49 CFR 1152.27(c)(1), the effective date of this decision and notice will be postponed beyond the effective date indicated here. See 49 CFR 1152.27(e)(2). In addition, the effective date may be further postponed at later stages in the OFA process. See 49 CFR 1152.27(f). Finally, if the line is sold under the OFA procedures, the petition for abandonment exemption will be dismissed and trail use and public use precluded. Alternatively, if a sale under the OFA procedures does not occur, the trail use and public use processes may proceed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment of, and discontinuance of service over, the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and the conditions that RJCE shall: (1) leave intact all of the right-of-way, including bridges, trestles, culverts, and tunnels (except track, ties, and signal equipment) for a period of 180 days from the effective date of this decision and notice to enable any state or local government agency or any other interested person to negotiate the acquisition of the line for public use; (2) comply with the terms and conditions for implementing trail use/rail banking as set forth below; (3) if there are any planned activities which would disturb or destroy any of the geodetic station markers on the line, contact NGS not less than 90 days in advance of such activities to plan for their relocation; (4) follow best management practices during salvage activities to prevent erosion and nonpoint water pollution; (5) prior to commencement of any salvage activities, contact Johnson County to discuss its concerns regarding water flow in streams and creeks; and (6) retain its interest in and take no steps to alter the historic integrity of all sites and structures on the right-of-way that are 50 years or older until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f.

2. RJCE is directed to serve a copy of this decision and notice on shippers located on the line within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. If an interim trail use/rail banking agreement is reached, it must require the trail user to assume, for the term of the agreement, full responsibility for the management of, any legal liability arising out of the transfer or use of (unless the user is immune from liability, in which case it need only indemnify the railroad against any potential liability), and for the payment of any and all taxes that may be levied or assessed against, the right-of-way.

4. Interim trail use/rail banking is subject to the future restoration of rail service and to the user's continuing to meet the financial obligations for the right-of-way.

5. If interim trail use is implemented and subsequently the user intends to terminate trail use, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

6. If an agreement for interim trail use/rail banking is reached by the 180th day after service of this decision and notice, interim trail use may be implemented. If no agreement is reached by that time, RJCE may fully abandon the line, provided the conditions imposed above are met.

7. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by December 30, 2004, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,200. See 49 CFR 1002.2(f)(25).

8. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

9. Provided no OFA has been received, this exemption will be effective on January 22, 2005. Petitions to stay must be filed by January 7, 2005; and petitions to reopen must be filed by January 18, 2005.

10. Pursuant to the provisions of 49 CFR 1152.29(e)(2), RJCE shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by RJCE's filing of a notice of consummation by December 23, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary